

Internal Revenue Service
memorandum

CC:TL:Br3
GEBowden

date: NOV 15 1990

to: District Counsel, Springfield

from: Chief, Branch 3, Tax Litigation Division CC:TL:Br3 I.R.C. Section 6653(b).

TL-N-9621-90

CC:TL:Br3 Bowden/Coe

I.R.C. Section 7201

Whether a conviction under I.R.C. Section 7201 based solely on false statements made after the filing of a return collaterally estops a taxpayer from denying fraud under

subject: [REDACTED], [REDACTED]

Your memorandum of August 14, 1990, requested Tax Litigation Advice.

ISSUE

Whether a conviction under I.R.C. § 7201 based solely on the making of false statements to agents of the Internal Revenue Service after the filing of an income tax return collaterally estops a taxpayer from denying that any underpayment of tax which exists for such year was due to fraud.

CONCLUSION

A conviction under I.R.C. § 7201 based solely on the making of false statements after the filing of a return does not collaterally estop a taxpayer from denying that any underpayment of tax which exists for such year was due to fraud.

DISCUSSION

The argument that you presented in your reply brief was that, because a criminal conviction under I.R.C. § 7201 is commonly held to provide collateral estoppel as to civil fraud under I.R.C. § 6653(b), and because section 7201 has been held to encompass making false statements to agents subsequent to the return, civil fraud may be based solely on post return false statements. This argument takes on a somewhat abstract character in the instant case because there was no section 7201 conviction (nor any criminal indictment). While the argument has some appeal, we believe that a considered analysis reveals it to be deficient. Accordingly, we deleted the argument from the brief.

In your memorandum, you suggest that we should seek to have the Tax Court reverse its holding in a forty year old memorandum opinion, Semple v. Commissioner, 10 T.C.M. (CCH) 795 (1951).

09387

However, we believe that the legal analysis in this opinion, notwithstanding its age, is correct. In Semple, the taxpayer presented agents with an altered copy of his divorce decree, hoping to persuade them that certain payments to his ex-wife were deductible alimony as claimed on his return rather than parts of a nondeductible property settlement. The Tax Court found that we had not clearly and convincingly carried our burden of establishing fraud. The court stated that there had been no showing of fraudulent intent when the return was made. This was a necessary element since "it is the return itself which is the basis of the imposition of the penalty." What was argued in Semple were the facts, not the requirement that fraud be "on the return." We acquiesced in this result then, O.M. [REDACTED] (attached), and we agree with it now. Further, Semple is not the only case that stands for this proposition. See, e.g., Gleis v. Commissioner, 24 T.C. 941 (1955), affd. 245 F.2d 237 (6th Cir. 1957); Barrier v. Commissioner, T.C. Memo. 1983-258.

In order for an underpayment to be due to fraud as required by section 6653(b), the fraud must precede or coincide with the underpayment. Otherwise, the underpayment could not be due to fraud.¹ As the term underpayment is defined by section 6653(c) and I.R.C. § 6211, it generally arises from a disparity between the amount of tax shown as due on the return and the amount of tax required to be shown on the return. There are some exceptions such as where no return has been filed, but in general an underpayment arises from a return. It is conventional logic that one event cannot be caused by another later event. Accordingly, the conventional requirement that fraud must be "on the return" results. Your argument fails to address this logical and well accepted interpretation of the statute. This failure would, in our view, be fatal to the acceptance of your argument by the court.


In addition to the foregoing, we believe that a likely result of presenting your argument to the court is an erosion of the court's established position on the preclusive effect of a section 7201 conviction on civil fraud. When the Tax Court adopted the position that a section 7201 conviction would collaterally estop a petitioner from contesting civil fraud, it was in the face of several dissenting opinions. Amos v. Commissioner, 43 T.C. 50 (1964). The dissenting judges argued, inter alia, that the language used in sections 7201 and 6653(b) is not at all the same and so there could arise cases in which there should be no collateral estoppel. In our view, the case

¹ This is axiomatic and is made even clearer by the I.R.C. § 6662 regulations being drafted. "Attributable to", as "due to", is an expression of causative effect. If intent to defraud occurs after the underpayment, by no stretch of logic could it have caused the underpayment.

you cite, United States v. Beacon Brass Co., 344 U.S. 43 (1952), is such a case. Collateral estoppel operates as an estoppel "only as to those matters in issue or points controverted, upon the determination of which the finding or verdict [in the prior case] was rendered." Cromwell v. County of Sac, 94 U.S. 351 (1876). When a section 7201 conviction is based solely on post return false statements, we do not believe collateral estoppel as to civil fraud would apply. In the vast majority of section 7201 cases, however, the matters in issue will be identical to those at issue in a determination of civil fraud and collateral estoppel will be available. The court's ready application of the doctrine of collateral estoppel provides an effective mechanism for the resolution of such cases. So long as we present only those cases to the court in which the overlap between the section 7201 conviction and the civil fraud issue is nearly total, we think there is little danger that the Court will reconsider its position.

All is not lost, however, with respect to post return false statements. Clearly such statements can be considered as evidence of fraudulent intent through the "relation back" doctrine. We believe that there is a significant chance of prevailing on this issue in the instant case without the collateral estoppel argument.

In summary, then, we believe that the argument you espouse both reaches an incorrect result and endangers a Tax Court precedent that we would prefer to preserve unaltered. Concomitant with this view, however, is the realization that some of the discussion appearing in various of our pronouncements of the preclusive effect of a section 7201 conviction on civil fraud may be overly broad. We will undertake to modify these pronouncements accordingly. In the meantime, if you have any specific cases where you believe that the preclusive effect of a section 7201 conviction may be called into question, we encourage you to seek our advice either formally or informally. In such an event, or if further discussion of the instant advice is desired, please contact George Bowden at FTS 566-3335.


SARA M. COE

Attachment:
O.M. [REDACTED]